SUPREME COURT OF APPEALS OF VIRGINIA.

JOHNSON *et al. v.* SMITH.

Nov. 19, 1908.

[62 S. E. 958.]

1. Wills (§ 614*)—Construction—Life Estate—"Heirs of Her Body" —"Children."—In a devise to one "during her natural life then to the heirs of her body, if any; if no children to her sisters," the words "heirs of her body" are equivalent to the word "children," and the effect was to vest in the devisee an estate for life.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1399-1404; Dec. Dig. § 614.*

2. Powers (§ 43*)—Power of Sale—Execution—Estate Conveyed.—Where a devise was to one for life, with remainder over, and another clause in the will gave such devisee an absolute power to sell the property while she remained unmarried, or in the event of her becoming a widow, its sale by her, within the limitations imposed, passed a fee-simple estate to a vendee.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 159; Dec. Dig. § 43.*]

Appeal from Circuit Court, Tazewell County.

Action by Taze Smith against Livie E. Johnson and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Harman & Pobst, for appellants.
H. C. Alderson, for appellee.

KEITH, P. This is an appeal from a decree of the chancery cause of Johnson *v.* Smith, rendered in the circuit court of Tazewell county upon facts agreed, which are as follows:

Taze Smith and wife conveyed to Livie E. Johnson, with the usual covenants, a certain house and lot at Pounding Mill, in Tazewell county, in consideration of $750, of which one-third was paid in cash and the balance to be paid in one and two years, evidenced by notes of the sendee, indorsed by M. Johnson, and secured by a vendor's lien retained in the deed. The notes not being paid at maturity, Smith instituted suit in the circuit court of Tazewell county to enforce the vendor's lien.

The defendants answered the bill, and stated that they had only recently learned that the lot purchased by them was a part of

For other definitions, see Words and Phrases, vol. 2, pp. 115-1140; vol. 8, p. 7601; vol. 4, pp. 3267-3271.]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

the land devised by Thomas Davis to Rebecca Caroline Davis, his daughter, by will dated April 13, 1863; that the plaintiff, Smith, derived such title as he had to the land from Ellen V. Ashbury by deed, and that Ellen V. Ashbury derived such title as she had thereto by deed from Rebecca Davis, and respondents claim that Rebecca Davis took only a life estate in the lands devised to her by the will of her father, and that under the terms of said will she could not convey a valid fee-simple interest therein, but only an estate for and during her natural life, and that the covenants in said deed were broken. Respondents therefore ask that "the sale be rescinded; that the title to the house and lot be vested in Taze Smith by a commissioner of the court, as his former estate therein; and that Livie E. Johnson recover of Taze Smith the purchase money already paid, and be relieved from the payment of the balance, and her costs."

Among the facts agreed it is shown that Rebecca Caroline Davis, while single, conveyed the property now in controversy to Ellen V. Asbury; and the sole question to be determined is whether or not her deed passed a life estate or a fee-simple interest in the land she undertook to convey.

So much of the will of Thomas Davis as is material to this controversy will be found in the following extracts:

"I give and bequeath to my daughter Rebecca Caroline Davis the remaining portion of land that I purchased from James Davis, supposed to be 90 or 95 acres, likewise a 60 acre tract that I purchased from Thomas Gillespie east of the James Davis tract. * * * To have and to hold said land * * * during her natural life, then the heirs of her body, if any; if no children, to her sisters." And in another part of the will is found this provision: "I desire that no sale made by any of my daughters of the aforesaid land * * * shall be firm, valid or binding, unless the sale is made while single or become widows, except for their own convenience may change land with each other."

We are of opinion that in the second clause of the will the words, "heirs of her body," are the equivalent of the word "children," and that the effect of that clause was to vest in Rebecca Caroline Davis an estate for her life in the land devised to her; that after her death it was to go to her children, if any, and, if she had no children, the remainder passed to her sisters; that by the second clause referred to Rebecca Caroline Davis was vested with a power of sale while she remained unmarried, or in the event of her becoming a widow, and that the power thus conferred upon her, if exercised, passed a fee-simple estate to her vendee.

In the case agreed it appears that while unmarried she did sell

the property now in controversy to Ellen V. Asbury, who conveyed by deed to Taze Smith, who, in turn, sold and conveyed to Livie E. Johnson. The sale and deed made by Rebecca Caroline Davis seem to have been strictly within the power conferred upon her by the will.

In the case of Farish *v.* Wayman, 91 Va. 430, 21 S. E. 810, the court said: "It can no longer be doubted that the law is settled that an estate for life, coupled with the absolute power of alienation, either express or implied, comprehends everything, and the devisee takes the fee." And in a note to that case (1 Va. Law Reg. 219) Judge Burks says: "It cannot be doubted that, though property is devised or bequeathed to one for life, even in the most express terms, yet, if by other terms in the same instrument it is manifest that the devisee or legatee is invested with absolute power to dispose of the subject at his will and pleasure, he is not a mere life tenant, but absolute owner, for there can be no better definition of absolute ownership than absolute dominion."

In Honaker *v.* Duff, 101 Va. 675, 44 S. E. 900, the court sanctions a statement of the law found in 3 Va. Law Reg. 65, to the effect that, when a life estate is given a devisee with power of disposition, the devisee is held to take a fee simple; if otherwise, the manifest intention of the will would be defeated. See, also, Milhollen's Adm'r *v.* Rice, 13 W. Va. 510, and Rubey *v.* Barnett, 12 Mo. 3, 49 Am. Dec. 112, where it is said: "When an express estate is given for life by will and a power of disposition is afterwards conferred, the devisee takes but a life estate with power of disposition, and, if no disposition is made, the reservation will go to the heirs of the devisor."

It is true that the cases cited are dealing with the effect of a life estate coupled with an unlimited power of disposition, while here there is a life estate coupled with a limited power of disposition; but that power exercised plainly within the limitations imposed upon it.

It is contended by counsel for appellants that the power of sale granted in the second clause refers to a disposition of the life estate; but, as shown by counsel for appellee, the power to sell the life estate, granted in the first clause, followed and was inherent in the devise itself. The devisee had the right to dispose of it at will, and there was no need of enlargement of her power for this purpose. The words of the second clause clearly indicate that a larger power and estate were intended, and the second clause would be absolutely meaningless if the testator intended by it to dispose of the life estate.

To enforce this position, counsel relies upon the case of Wooten *v.* Redd's Ex'r, 12 Gratt. 208, where the court says: "In

the construction of wills it is a well-settled rule that effect must be given to every word of the will, if any sensible meaning can be assigned to it not inconsistent with the general intention of the whole will taken together." This principle has been enforced in numerous decisions.

Upon the whole case, we are of opinion that there is no error in the decree of the circuit court, which holds that appellants took a fee simple to the land in controversy. Decree affirmed.

Affirmed.

Note.

The July number of the "Law Register" (14 Va. Law Reg. 161) contains an interesting query as to the present status of the rule in May *v.* Joynes, in light of a recent statute amending § 2418 of the Code of 1904, apparently for the purpose of abolishing the rule in that case. But those who feel any affection for that rock-ribbed rule and fear that its abolition may cause a decline in litigation, may derive much solace from the following remarks of Mr. Preston Cocke in that article. He says: "If it was the intention of the Legislature to bury May *v.* Joynes, it does not behoove the Bar to shed any tears over its grave, as it will probably be productive of much litigation for a generation or more to come. But for the community at large, for whose benefit alone laws should be enacted, the above statute seems to be a piece of unwise legislation."

BRUCE *v.* SHULER.

Nov. 19, 1908.

[62 S. E. 973.]

1. Wills (§ 116*)—Witnesses—Competency.—Under Code 1904, § 2514, requiring non-holographic wills to be attested by two competent witnesses, the witnesses must be competent at the time of attestation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 293; Dec. Dig. § 116.*]

2. Wills (§ 116*)—Witnesses—Competency—Beneficiaries.—At common law and under Code 1904, § 2529, beneficiaries under a will are not competent witnesses thereto.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 287; Dec. Dig. § 116.*]

3. Wills (§ 303*)—Execution—Proof.—Though under Code 1904, § 2514, a will must be attested by two competent witnesses, its due execution can be proved by one witness, but he must prove all the statutory essentials to a due execution, including attestation by two competent witnesses.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.